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In the Office of the Clerk of Court Washington Court of Appeals, Division Three By

NO. 241688

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Detention of:

David James Lewis,

Petitioner.

PETITION FOR REVIEW

William Edelblute Attorney for Petitioner WSBA 13808 200 N. Mullan Ste. 119 Spokane, WA 99206 (509) 928-3711

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A. IDENTITY OF PETITIONER

David J. Lewis, Appellant in the Court of Appeals, Petitions for Review of the Opinion designated in Part 2.

B. COURT OF APPEALS OPINION

The unpubished opinion of the Court of Appeals filed on Sepember 14th ,2006. A copy is in the Appendix at pp. A1 -A10.

C. ISSUES PRESENTED FOR REVIEW

- 1. Because Petitioner's trial counsel had sent a questionnaire to residents of Columbia County to gather information in support of a motion, the trial judge found the jury pool was being tainted and *sua sponte* ordered a change of venue to Garfield County. Did the trial court violate Petitioner's right to have his trial in the proper venue?
- 2. Petitioner was being held in custody pending trial on a charge of Rape of a Child in the First Degree when the petition was filed. Because Petitioner was not "about to be released" when the petition was filed and no "recent overt act" was plead or proved, does his

commitment violate due process of law?

3. Was the evidence sufficient to convince a rational trier of fact that all of the elements of the State's case were proven beyond a reasonable doubt?

D. STATEMENT OF THE CASE

The State Attorney General's office filed a sexually violent predator petition against Petitioner on July 1st, 2003. Mr. Lewis was in custody, awaiting retrial in Walla Walla County, following reversal of his conviction for rape of a child in the first degree. CP 1-2. CP 11.

The Petition alleged that Mr. Lewis was convicted of Child Molestation in the First Degree in Columbia County in 1992. It further alleged that he suffered from a mental abnormality, pedophilia. CP 1.

Mr. Lewis had been released in 1999, but upon "release" he was arrested by a DOC officer for failure to have a provable address. While being held in the Columbia County jail, the State filed a SVP petition in 1999. Then, charges in Walla Walla county were filed, based on alleged acts in 1991-92, and the SVP petition was dismissed, on June 30, 2000. CP 53. Mr. Lewis, under the name of Eaker, was

convicted of Rape of a Child in the First Degree, which was the conviction overturned, and it was that charge for which he was awaiting re-trial in custody when the instant petition was filed. At the time of filing of the petition, his trial was set for July 14, 2003. CP 11. The Walla Walla charge was dismissed on July 11th, 2003. CP 19.

The Columbia County Superior Court entered an Order determining probable cause for the SVP petition, on July 1, 2003. CP 14-15.

Mr. Lewis's counsel on September 19, 2003, filed a motion to dismiss "because the State lacks jurisdiction", on the basis that Mr. Lewis was not "about to be released from custody" at the time of the petition. CP 18-23.

The trial court entered an order on October 1st, 2003, denying Mr. Lewis's motions. CP 62-63.

Later, a second attorney representing Mr. Lewis filed a "Motion to Dismiss: Unconstitutionally Vague Violation of Due Process." RP 68-78. As part of the preparation for a motion to dismiss, Petitioner's trial counsel mailed out questionnaires to residents of Columbia County, inquiring whether certain statutory terms were understandable to them,

and whether they needed further definition. The questionnaires that were answered and were filed with the trial court on March 23, 2005. CP 104-164.

Prior to filing of the questionnaires, on March 17th, 2005, the State moved that the court order Mr. Thronson to "stop" sending out the questionnaires, arguing it was "entirely improper. ... We are already tainting a jury pool." RP C 11-12. The State told the court that some people were already under summons for jury duty "conceivably in this trial ...". RP C 12.

Mr. Thronson had already sent out 125 questionnaires. He indicated he did not know who had been summoned for jury duty. He provided a court with the list of people to whom the questionnaires had been sent. The people had been "randomly picked out of the phone book ...". RP C 13.

The responses to the questionnaire were designed to be returned anonymously. Counsel sent the questionnaires to "develop that evidence" relevant to issues of whether the statute in issue could be understood by persons of common and ordinary intelligence. He

argued that "... I've got to discover the evidence to defend my client." RP C 14-15.

The trial judge estimated that the jury pool for Columbia County would consist of about 3,000 people out of 4,200 residents. And that assuming recipients of the questionnaire were married, that up to 250 people were exposed to the questionnaire, "pushing 10 percent of the jury pool." RP C 16.

The trial judge stated that "this is absolutely reprehensible conduct" and that if the state's counsel did not report it to the bar association, that he would. RP C 18, lines 10-13.

The trial judge then stated:

You have just poisoned the whole jury panel venery in Columbia County.

On my own motion, I hereby change venue to Garfield County.

I'm also assessing terms to respondent's counsel for any extra expense Columbia County has to go through for moving this trial over to Garfield County.

State's motion is granted as expanded upon by me.

RP C 18, lines 14-19.

On March 25th,2005 the trial court denied the motion to dismiss by Mr. Lewis which was based on vagueness. RP 165-66.

Evidence presented to the jury included the following:

P.D. testified that she was now 26 years of age. Mr. Lewis was her cousin. In the spring of 1991, according to P.D., Mr. Lewis touched her on her breasts and vagina, on the outside of her clothing. Her friend, Tracy, told her that Mr. Lewis touched her but she was afraid she would be in trouble if she told. RP E 9-13. P.D. reported what happened to her mother, and to a school counselor. RP E 15.

Before the incident described by P.D., Petitioner had earlier bragged to her that he had touched other children, and that nothing was ever done. RP E 18. Later, when Mr. Lewis was in prison, he called her and told her it was her fault he got locked up. RP E 18-19.

J. F. testified that Mr. Lewis was her half brother and that she had not seen him since she was age six. In March of 1992, Mr. Lewis got her off the bus, took her into a trailer that the family was going to be moving into and made her suck his penis and gave her a candy bar not to tell. RP E 22-25. She told her mother and father about it. RP E 31.

In later phone contact with Mr. Lewis, he blamed their mother and father for what he had done. RP E 33.

M.F. testified that he was now age 24 and described Mr. Lewis as his brother. When he was nine years old, when the family lived in Walla Walla, Mr. Lewis was about twice his size, and Mr. Lewis had M.F. suck his penis. He did so by telling M.F. he would get M.F. in trouble with their parents if he did not do so. This occurred several times. RP E 37-46. The last time it occurred was 1991 and M.F. did not tell anyone until 1995, when he learned it had happened to his sister as well. RP E 52-53.

Linda Frovarp, Mr. Lewis's mother, testified as to J.F.'s report to her and her husband. RP E 59. After his conviction for that, he had called home on one occasion and asked to speak to S., her niece. Ms. Frovarp remained on the other line, and heard Mr. Lewis apologize to S., saying he shouldn't have done anything to her. RP E 62-63. Then he said "Well, it felt good." RP E 64.

Mr. Lewis also told his mother sometime around 195 that he felt he would re-offend. RP E 65.

Barbara Vinyard, a correctional officer at the Washington State Penitentiary, testified that there were complaints about Mr. Lewis "grabbing" other inmates, and watching them getting undressed. RPE 84. When questioned, he said he had poor impulse control. RPE 86-87. Similar complaints were made about Mr. Lewis within a couple of weeks. RPE 88.

John Blasdel testified that he had been an inmate in the segregation unit with Mr. Lewis. Another inmate said something about Mr. Lewis's sex crimes. In response, Mr. Lewis had said words to the effect of "This is what I can do to your family." RP 133.

Henry Morton was also an inmate in segregation with Mr. Lewis in about 1999. He testified Mr. Lewis would talk about "what he would do to kids" and said if he got out, he would do something to Mr. Morton's family. RP 143. That he would "screw" his kids,, and do the same to another inmate's family. RP 145-46.

Morton also alleged that Lewis and another inmate would ejaculate in a cup and swing the cup to each other's cell on a string and the other inmate would say he tasted Mr. Lewis's ejaculate. RP 146-47.

Donna Hubbs, of the Department of Corrections testified that an inmate named Evans complained that Mr. Lewis had touched him at least ten times on the buttocks and at least seven times on his penis and scrotum. Another inmate complained he tried to grab his penis. RP 169.

As the release date for Mr. Lewis neared, Ms. Hubbs was involved in making plans for his release. A process of "triage" was used for offenders who "have no community support" and who had a high likelihood of re-offending, and "the community wanted us to be more involved than just letting them lose with \$40 gate money and bus tickets." RP 179. She arranged application for food stamps for him upon his release, and for \$100 in gate money. But he had nowhere to live. An apartment complex in Spokane that accepts sex offenders would not accept him because he did not have a \$250 deposit. RP 179-81. RP 193.

Ms. Hubb discussed with Mr. Lewis whether he would voluntarily commit himself as a sexually violent predator. He stated he would like to be out for a weekend first. He stated his chances of re-offending

were 50/50. RP 183-84.

When his term of confinement ended he was "released" then arrested within minutes, for not having an approved address. RP 194.

Amy Phenix, Ph.D a clinical psychologist in private practice, was the State's expert witness. She testified that "predatory acts" are sexually violent offenses:

against a person who is a stranger to them. They don't know them at all. A person with whom they have no real established relationship, or what we call kind of a casual relationship.

RP 310, lines 13-25.

Or, it could be where a relationship was established to have sexual acts with the person. RP 311, lines 1-3. This would mean "grooming", buying a child things or taking them places to establish a trusting relationship and taking them to isolated places. RP 311, lines 5-14.

Dr. Phenix had diagnosed Mr. Lewis with an antisocial personality disorder. RP 312. And with three other "mental abnormalities", pedophilia, marijuana abuse, and child abuse. RP 314-15.

Dr. Phenix was of the opinion that Mr. Lewis's pedophilia predisposed him to commit criminal sexual acts in a degree constituting

a menace to the health and safety of others. RP 330.

To Dr. Phenix, the term "likely" means "greater than a 50 percent chance." RP 342, lines 10-13. Her opinion was that he was likely to commit new sexually violent predatory offenses in the future. RP 342, lines 15-21. Dr. Phenix in part based the reliability of the actuarial instrument on the belief that is under estimates likelihood of reoffending, because "[m]ost sex offenses are unreported." RP 346.

Dr. Phenix indicated that the margin of error for the instrument she used to predict Mr. Lewis's chance of reoffending could "take it below the 50th percentile", as phrased in the question posed. RP J 440, lines 16-18. In fact the chance of re-offense could be as low as 44 percent. RP J 442-44.

Dr. Kenneth Wollert, called by Mr. Lewis, was of the opinion that because Mr. Lewis was willing to undergo treatment under certain conditions, that he "does not present any differently than individuals who are nonpredatory sex offenders ...". RP 592, lines 18-22. Wollert believed that the chance of re-offense was less than fifty percent, in fact, below sixteen percent. RP 664-65.

The jury returned a verdict that Mr. Lewis was a sexually violent predator, and he was committed to the Special Commitment Center.

CP 199, CP 202-03.

This appeal followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The trial court erred in changing venue from Columbia County

Review should be accepted pursuant to RAP 13.4(b), as involving an issue of substantial public interest. A plaintiff's choice of forum should rarely be disturbed. J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha.

105 Wn.App. 657, 661, 20 P.3d 967 (2001); see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

RCW 4.12.030 provides:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; .

The appellate court will review a trial court's decision on a motion to

transfer venue for an abuse of discretion. <u>Hickey v. City of Bellingham</u>, 90 Wn.App. 711, 719, 953 P.2d 822 (1998). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. <u>State ex rel. Carroll v. Junker</u>, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court judge, without examination of potential jurors, and without examination of the responses of the 25 people who answered the questionnaires, in a summary manner, decided that venue would be transferred. It was an abuse of discretion to assume that all of the people who were sent the questionnaires had read them, that their spouses had read them as well, and to assume it would render those potential jurors impartial. The State represented that summons had already gone out to some people who could be called for this trial, there was no comparison of the list of people to whom questionnaires had been sent with any list of people summoned. The judge's decision was primarily based upon speculation. Even if ten percent of the jury pool had supposedly been tainted, if for example 36 people were brought in for a panel, then three or four would have to be excused, hardly

rendering it impossible to pick a jury.

"[T]he perceived expertise of a given court, ..., is not a proper basis for a venue choice." (perception that another county would more efficiently handle case is not sufficient) Hatley v. Saberhagen Holdings. Inc. 118 Wn. App. 485, 489-490, 76 P.3d 255 (2003).

Because the trial judge changed venue without sufficient cause, the Order of Commitment should be reversed, and the case remanded for a new trial.

2. The court lacked jurisdiction over the Appellant

Review of this issue should be accepted pursuant to RAP 13.4(b)(1), as the decision of the Court of Appeals is in conflict with <u>In re</u> <u>Detention of Albrecht</u>, 147 Wn.2d 1, 51 P.3d 73 (2002). Mr. Lewis, whose name was formerly Eaker, had been found guilty of rape of a child in the first degree on November 1st 2000, in a Walla Walla County case. The conviction was reversed and remanded for new trial in <u>State v. Eaker</u>, 113 Wn. App. 111, 53 P.3d 37 (2002), rev. denied 149 Wn.2d 1003.

The new trial was scheduled for July 14th, 2003, with Mr. Lewis held

in custody. On July 1st, 2003, the State filed a sexually violent predator petition in Columbia County. The pending Walla Walla County charges were dismissed on July 11th, 2003. CP 19.

RCW 71.09.030 permits filing of a "predator" petition only where "[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement. ...".

Mr. Lewis was not about to be released at the time of the filing of the petition.

Where the petition is not properly based upon the fact that the subject of the petition is "about to be released", then, under <u>In re Detention of Albrecht</u>, 147 Wn.2d 1, 51 P.3d 73 (2002), the State is required to to plead and prove a "recent overt act."

Albrecht applies to a person who is incarcerated "where the State files a sexual predator petition on an offender (1) who has been released from confinement (2) but is incarcerated the day the petition is filed (3) on a charge that does not constitute a recent overt act." 147 Wn.2d at 11 n. 11, 51 P.3d 73.

Albrecht held, "[a]n individual who has recently been free in the

community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous." 147 Wash.2d at 11, 51 P.3d 73. This is crucial because due process requires proof of dangerousness to justify commitment. *See* In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993). Young, 122 Wash.2d at 27, 857 P.2d 989 (citing Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809-10, 60 L.Ed.2d 323 (1979); Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)).

A violation of community placement, as discussed in <u>Albrecht</u>, could fall short of being an overt act. *See* <u>Albrecht</u>, 147 Wn.2d at 11, 51 P.3d 73. Since the State did not allege or prove a "recent overt act" to the jury at trial, there was no showing of dangerousness and <u>Albrecht</u> and <u>Young</u> require reversal. <u>Albrecht</u>, 147 Wn.2d at 11 & n. 11, 51 P.3d 73; <u>Young</u>, 122 Wn.2d at 59-60, 857 P.2d 989.

Mr. Lewis simply does not fall within the categories of persons the legislature has provided can be the subject of an SVP petition. The State has created a new category, those who are awaiting trial on criminal charges.

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* - specific inclusions exclude implication. Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969);

Landmark Devel., Inc. v. City of Roy, 138 Wn.2d 561 (1999).

The State failed to plead or prove Lewis either was about to be released from custody when the petition was filed, or that he committed a "recent overt act" before committing him as a sexually violent predator under chapter 71.09 RCW. Under our Supreme Court's holding in <u>Albrecht</u> the State's failure results in the lack of a necessary element of proof to justify commitment. The commitment must be reversed and Lewis must be released.

The process of filing this petition was a procedural hall of mirrors.

The first petition was filed after his sentence was served, but he was supposedly in violation of his sentence for not having a place to live.

That petition was then dismissed because of criminal charges filed

in Walla Walla County. Then a petition was filed while Mr. Lewis awaited re-trial on those charges. Then the Walla Walla charges are dismissed.

Allowing the State to claim that Mr. Eaker was about to be released from custody, when that was not the case, allows the State to circumvent the statutory requirements, including the other basis for filing a petition, which would be a "recent overt act."

This Court should reverse the Order of Commitment, and order that the petition be dismissed with prejudice.

3. The evidence was insufficient to support the verdict finding Appellant to be a sexually violent predator.

Review of this issue should be accepted pursuant to RAP 13.4(b) (3), as the sufficiency of evidence issue involves due process of law. In reviewing a sufficiency challenge, the appellate court will view the evidence in the light most favorable to the State and determine if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735

(2003). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Part of the information that Dr. Amy Phenix, the State's expert witness, based her opinion upon was that even through a victim named T. W. had denied to police that anything had happened, she had reportedly told a good friend that it happened. RP J 417, lines 12-23. Other than that, most of the incidents involving Mr. Lewis were against relatives, thus the facts do no meet even Dr. Phenix's own understanding of "predatory", nor do they meet the definition given to jurors in the instructions. CP 193.

Dr. Phenix indicated that the margin of error for the method she used to predict Mr. Lewis's chance of reoffending could "take it below the 50th percentile", as phrased in the question posed. RP J 440.

In fact the chance of re-offense could be as low as 44 percent. RP J 442-44.

Therefore, the evidence is not sufficient to show Mr. Lewis was "likely" to re-offend, as even Dr. Phenix conceded that meant more

than a 50/50 chance. And, as argued in part 2 above, the State failed to prove either that Mr. Lewis was about to be released when the petition was filed, or that he had committed a recent over act.

Therefore the evidence is insufficient. The Order of Commitment should be reversed, and the petition dismissed with prejudice.

F. CONCLUSION

The Court should accept review reverse and dismiss due to insufficiency, and due to violation of due process, or in the alternative, should order a new trial with venue in Columbia County.

Respectfully submitted,

October 16th, 2006

William Edelblute Attorney for Petitioner

WSBA 13808

Certificate of Mailing

I hereby certify that on the 16th day of October, 2006, I mailed true and accurate copies of the foregoing Brief of Appellant to, Sarah Sappington, Assistant Attorney General, at 900 4th Ave., Ste. 2000, Seattle, WA 98164-1076, and to David Lewis, Petitioner, at P.O. Box 88600, Steilacoom, WA 98388, postage

prepaid.

William Edelblute Attorney for Petitioner

WSBA 13808

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In the Office of the Clerk of Court WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| In re the Detention of: |) | No. 24168-8-III |
|-------------------------|--------|-------------------|
| |) | |
| DAVID JAMES LEWIS, |) | Division Three |
| |) | |
| Appellant. |)) | PUBLISHED OPINION |

SCHULTHEIS, A.C.J. — David James Lewis was found to be a sexually violent predator and was civilly committed pursuant to chapter 71.09 RCW. On appeal, Mr. Lewis claims: (1) the trial judge improperly changed the venue of his trial; (2) the State was required to allege and prove a recent overt act; and (3) there is insufficient evidence to support the jury's verdict. Finding no error, we affirm.

FACTS

David James Lewis (also known as Roy Eaker) pleaded guilty to two counts of child molestation in the first degree in Columbia County in 1992. He was concurrently sentenced to 68 months on count 1 and 89 months on count 2. The victim was his five-year-old half sister, J.F. Although Mr. Lewis had a release date of August 5, 1999, he was not released for failure to provide an approved residence address. While he was held in the

Columbia County jail, the State filed a sexually violent predator (SVP) petition on August 6, 1999. Before the SVP petition went to trial, Mr. Lewis was charged with first degree rape of a child in Walla Walla County on May 24, 2000. The charge was based on acts alleged to have occurred between 1988 and 1991 against his eight-year-old half brother. *State v. Eaker*, 113 Wn. App. 111, 113, 53 P.3d 37 (2002). The SVP petition was dismissed on June 30, 2000. Mr. Lewis was found guilty on the Walla Walla County charge of first degree rape of a child on November 1, 2000. This court reversed the conviction and remanded for a new trial in August 2002. *Id.* at 121. A new trial was set for July 14, 2003. As Mr. Lewis was awaiting retrial, the State filed a SVP petition in Columbia County on July 1, 2003. The Walla Walla County charge was dismissed on July 11, 2003.

Mr. Lewis moved to dismiss the SVP petition on September 19, 2003, because he was not "about to be released from total confinement" at the time of the filing of the petition. Clerk's Papers (CP) at 23 (quoting RCW 71.09.030(1)). On October 1, the trial court denied the motion, reaffirmed its probable cause finding, and ordered Mr. Lewis's commitment and evaluation.

On February 9, 2005, Mr. Lewis made a motion challenging the SVP statute for vagueness. As part of his preparation for the motion, Mr. Lewis's counsel mailed 125

¹ The initial order determining probable cause is not a part of the record.

questionnaires to Columbia County residents, randomly selected from the telephone book.

The questionnaire described facts similar to those in Mr. Lewis's case. The recipients

were instructed to imagine themselves as jurors and asked to indicate whether certain

statutory terms were understandable to them.

The State filed a motion on March 16, to enjoin Mr. Lewis's counsel from having further communication with prospective jurors. Mr. Lewis's attorney argued that he sent the questionnaires to develop the evidence he needed to show that the statute could not be understood by persons of common and ordinary intelligence. Upon hearing that motion, the trial judge changed the venue to Garfield County sua sponte, commenting that counsel had "just poisoned the whole jury panel venery in Columbia County." Report of Proceedings (RP) (Mar. 17, 2005) at 18. The judge also ordered terms for the cost of transferring the trial and indicated he would report the conduct to the bar association if the State did not. On March 25, the trial court denied the motion to dismiss for vagueness.

On April 29, a jury found that Mr. Lewis is a sexually violent predator. The judge ordered his commitment for control, care, and treatment until such time as his mental abnormality and/or personality disorder has changed and he is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. Mr. Lewis appeals.²

² Three weeks before the oral argument setting for this appeal, the State filed a motion on the merits. The motion did not raise any new issues or arguments. The parties ultimately waived oral argument, and the matter remained on the judicial calendar.

DISCUSSION

A. Change of Venue

Commitment under the sexually violent predator statutes is a civil action. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). The civil procedure statute for grounds authorizing the court to change venue provides:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,
- (4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity, within the third degree; when he has been of counsel for either party in the action or proceeding.

RCW 4.12.030.

"[A] trial court must exercise its discretion on the issue of venue with reference (1) to whether an impartial trial can be had; (2) to the convenience of witnesses; and (3) to whether the ends of justice would be forwarded." *Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744 (1963). That decision will be not be reversed absent a prima facie showing of manifest abuse of discretion. *Id.* at 765-66. Abuse of discretion is demonstrated only when it is exercised on untenable or manifestly unreasonable grounds. *Baker v. Hilton*, 64 Wn.2d 964, 966, 395 P.2d 486 (1964).

A court may change venue on its own motion and has "inherent power to order a change where necessary for the proper administration of justice." *Clampitt v. Thurston*County, 98 Wn.2d 638, 648 n.7, 658 P.2d 641 (1983). The court must initiate a change of venue under some circumstances. *Id.* at 648-49.

In reaching the decision to change venue, the trial judge in this case determined that the questionnaire could have reached nearly 10 percent of the jury pool in Columbia County. The court also considered that the defense created the circumstances that required the change of venue. Because the judge ordered the defense to pay terms in the cost of transferring the trial, we are persuaded that the court was simply requiring Mr. Lewis's counsel to correct the situation rather than waste the judicial time and resources to vet a jury pool that the defense tainted. Judicial economy is an appropriate consideration under RCW 4.12.030. *Id.* at 647. The court did not abuse its discretion by changing the venue for the trial.

B. Proof of Recent Overt Act

The SVP statutes distinguish between persons in custody for a sexually violent offense and those who are released on the date a SVP petition is filed when identifying the facts the State must allege and prove when bringing a SVP petition. First, for a person who "is about to be released from total confinement" and "who at any time previous has been convicted of a sexually violent offense," the SVP petition need only allege that the person is a sexually violent predator. RCW 71.09.030(1). Second, when a person "who at

any time previously has been convicted of a sexually violent offense and has since been released from total confinement," the State must additionally allege that the person "has committed a recent overt act." RCW 71.09.030(5). "If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act." RCW 71.09.060(1).

Mr. Lewis claims that because he was awaiting retrial, he was not "about to be released" as provided in RCW 71.09.030(1), thus the State was required to allege and prove that he committed a recent overt act. We review the trial court's interpretation of the statute as a question of law, which is reviewed de novo. *In re Det. of Williams*, 147 Wn.2d 476, 486, 55 P.3d 579 (2002).

Proof of a recent overt act is necessary to satisfy due process concerns when the person has been released from confinement on a sex offense. *Young*, 122 Wn.2d at 41-42 (citing *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982)). This requirement limits deprivations of liberty to circumstances in which the State can demonstrate present dangerousness. *In re Det. of Albrecht*, 106 Wn. App. 163, 168, 23 P.3d 1094 (2001), *aff'd*, 147 Wn.2d 1, 51 P.3d 73 (2002). Proof of a recent overt act is not required if the person is incarcerated at the time the petition is filed because confinement necessarily prevents overt acts from occurring. *Young*, 122 Wn.2d at 41.

Because Mr. Lewis was incarcerated for a sexually violent offense and not released, the State was not required to plead or prove a recent overt act.

Mr. Lewis asserts that the State simply elected to file the SVP petition rather than retrying him on the criminal charges. The State asserts that the Walla Walla County prosecutor advised that if Mr. Lewis was retried and resentenced on the criminal charges overturned on appeal, he would likely receive no more prison time than he would have already served. Therefore, the prosecution elected not to retry Mr. Lewis and he was about to be released, so the State filed the SVP petition. As with any charging decision, prosecutors have the discretion to retry a case—or not to retry a case—overturned on appeal. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) ("prosecutors are vested with wide discretion in determining how and when to file criminal charges"); *State v. Roche*, 114 Wn. App. 424, 447, 59 P.3d 682 (2002) (remanding for a new trial "if the State should elect to retry"). Mr. Lewis has not shown that anything improper occurred.

C. Sufficiency of Evidence

Mr. Lewis challenges the sufficiency of the evidence of the jury's determination that he is a sexual predator.

A SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a

secure facility." RCW 71.09.020(16).³ Proof is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found those elements beyond a reasonable doubt. *In re Det. of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003).

Mr. Lewis only challenges the determination that he is "likely to engage in predatory acts." He argues that not all of the past acts in evidence were shown to be predatory. The State correctly points out the focus of the inquiry is future acts. The jury was to determine whether Mr. Lewis more probably than not will engage in predatory acts if he is not unconditionally confined.

Mr. Lewis also seems to argue that the State's expert did not understand the legal definition of predatory.⁴ The record shows otherwise.⁵

To establish that David Lewis is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

That David Lewis has been convicted of a crime of sexual violence, namely, Child Molestation in the First Degree;
 That David Lewis suffers from a mental abnormality or

(2) That David Lewis suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and

(3) That this mental abnormality or personality disorder makes David Lewis likely to engage in predatory acts of sexual violence if not confined to a secure facility.

CP at 190.

"Predatory" means acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

CP at 193.

³ Similarly, the jury was instructed that:

⁴ The jury was instructed in accordance with RCW 71.09.020(9) that:

⁵ During direct examination, the expert was asked, "Why do you think that the sexual offenses that he's likely to commit will be predatory?" RP (Apr. 27, 2005) at 390.

Mr. Lewis contends that the evidence is insufficient based on the opinion of the State's own expert. He asserts that the predictive method the expert used showed only a 44 percent likelihood that he would reoffend.

The State's expert testified that she used the Static 99, a commonly used actuarial instrument, on which Mr. Lewis scored a 7. A score of 6 or greater indicates a high risk. The test indicated a 52 percent likelihood of reconviction within 15 years. The 44 percent figure derives from the 8 percent margin of error or confidence interval. But that also means the likelihood of reconviction could be as high as 60 percent. The jury heard the testimony concerning the margin of error. Mr. Lewis also scored in the high range on the MnSOST-R (Minnesota Sex Offender Screening Tool, Revised), another actuarial instrument the expert used. It showed Mr. Lewis had a 57 percent probability of reconviction within 6 years.

The expert testified that the Static 99 margin of error did not affect her opinion.

First, the Static 99 measures reconvictions, which underestimates risk of reoffense.

Second, the expert reviewed other dynamic risk factors that placed Mr. Lewis in a high risk to offend in the over-50-percent range. These dynamic risk factors included the nature of relationships, emotional identification with children, sexual self-regulation, current attitudes, general self-regulation, and completion of sex offender treatment.

The expert prefaced her response by observing, "[A]nd that would be, basically, not incest offenses, but casual acquaintances and strangers." *Id.* at 390-91.

The expert also diagnosed four abnormalities—antisocial personality disorder, pedophilia, marijuana abuse, and child abuse. Mr. Lewis has a previous conviction for a sexually violent offense. *See* RCW 71.09.020(15)(a) (providing that child molestation in the first degree is a sexually violent offense). The evidence was sufficient to support the jury's determination that Mr. Lewis is a sexually violent predator.

CONCLUSION

We conclude that the trial court did not abuse its discretion in changing the venue for the trial. We also conclude that because Mr. Lewis was incarcerated for a sexually violent offense and not released, the State was not required to plead or prove a recent overt act when petitioning to have him committed as a SVP. Finally, we conclude that there is sufficient evidence to support the jury's determination that he is a SVP. Accordingly, we affirm.

Schultheis, A.C.J.

WE CONCUR:

Brown, J.

Knlik I